Supreme Court, U.S.
FILED
JAN 21 19
SPANIOL, JR.
CLERK

No. 86-942

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

RHODE ISLAND PUBLIC UTILITIES COMMISSION, and
NEW JERSEY BOARD OF PUBLIC UTILITIES,
Petitioners,

v.

METROPOLITAN TRANSPORTATION AUTHORITY,
Respondent.

On Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MUNICIPAL ELECTRIC UTILITIES ASSOCIATION'S BRIEF IN OPPOSITION TO CROSS-PETITION

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January 21, 1987

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTION PRESENTED

Whether, in view of the attenuated relationship of cross-petitioners to the proceedings below, it would be appropriate at their behest to grant review of the decision below, entered in relation to the Vermont Department of Public Service, which has not sought review, that a state agency which functions not as a distributor of power to consumers, but as a broker to procure preference power for both preference and nonpreference entities, does not qualify as a "public body" within the meaning of the Niagara Redevelopment Act, 16 U.S.C. § 836(b).

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Niagara Redevelopment Act, Pub. L. No. 85-159, 71 Stat. 401 (1957), § 1(b), 16 U.S.C. § 836(b) (1985) ..... *passim*

Bonneville Project Act of 1937, ch. 720, 50 Stat. 731, § 4, as amended, 16 U.S.C. § 832c (1985) 4

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STATEMENT OF CASE

The case is stated in the segment of the opinion below headed "Background." A4-11. [1]

Among the issues addressed in the proceedings before the Federal Energy Regulatory Commission

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[1] "A" references are to pages so designated in petition of Metropolitan Transportation Authority in Metropolitan Transportation Authority v. Federal Energy Regulatory Commission, Docket No. 86-736 (U.S. filed Nov. 3, 1986).

("FERC") reviewed by the court below was the entitlement of the Vermont Department of Public Service ("VDPS," formerly the Vermont Public Service Board), as then structured, and the Metropolitan Transportation Authority ("MTA") to receive power from the Niagara project out of the portion reserved for preference customers, *i.e.* "public bodies and nonprofit cooperatives." The entitlement of MTA was challenged on the ground it is only a consumer and not a distributor of power. The entitlement of VDPS was challenged on the ground it was, as then structured, only a broker and not a distributor of power, which disposed of a substantial amount of the preference power allocated to it to privately owned utilities.

FERC held that to qualify as a "public body" within the intendment of 16 U.S.C. § 836(b), an entity must be publicly owned and capable of selling and distributing power directly to consumers of electricity at retail and that neither a body like MTA, that is only a consumer of power, nor a body structured as then was VDPS, that was only a broker making preference power available to privately owned as well as to publicly or cooperatively owned utilities, was qualified. A29-30, 65. The court below affirmed. A16, 20.[2]

The cross-petitioners here were permitted to intervene out of time before FERC contemporaneously with the entry by FERC of its final decision after rehearing. The order recites that their admission as

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[2] The court noted that the Vermont legislature undertook to restructure VDPS in 1986 and that the question of its qualification as restructured was not addressed by FERC and was not before the court on appeal. A11.

intervenors shall not be construed as recognition that they might be aggrieved by any order entered in the proceeding and is conditioned on their acceptance of the record as developed prior to their late interventions. A44.

REASONS FOR DENYING CROSS-PETITION

The only parties determined by this case not to qualify as preference customers of Niagara power are VDPS, as formerly structured, and MTA. The qualifications of neither cross-petitioner were in issue or determined. The most they can contend is that, because they deem themselves to be structured similarly to the former VDPS, they apprehend they may be held in the future not to qualify as preference customers under the standards applied to the former VDPS. Their interest in the decision defining "public bodies" is no more than in its effect as precedent.

In addition to being attenuated, the position of cross-petitioners is anamolous. Ordinarily a cross-petition is filed by a party who, but for the fact that another party seeks review, would accept the judgment of the subordinate court but who, in the event the judgment is reviewed, desires to have it reviewed in respects other than as requested by the first petitioner. Grant of review sought by a cross-petition filed beyond the time for an original petition is conditioned upon grant of the latter.

Cross-petitioners here are not essentially satisfied with the judgment below and their cross-petition does not seek to have the judgment reviewed in respects essentially different from the review sought by MTA. They aver only that MTA did not present the public body issue broadly enough. Cross-Petition for a Writ

of Certiorari filed by Rhode Island Public Utilities Commission and New Jersey Board of Public Utilities at 8-9. Acknowledging that their cross-petition cannot be granted unless MTA's petition is, they say "if that petition is granted then this cross-petition must also be granted in order for this Court to consider all of the relevant issues raised by the challenged construction of the term 'public bodies.' " *Id.* Thus, the cross-petition does not "cross" the petition of MTA but undertakes to broaden or supplement it.

Finally, the cross-petition sets forth no reason for its grant other than that the court below erroneously construed "public bodies" as the term is used in 16 U.S.C. § 836(b). The language in the preference provision of the Niagara Redevelopment Act was borrowed from other acts of Congress according preference in the purchase of power from federal hydroelectric projects to public bodies and cooperatives, particularly § 4 of the Bonneville Project Act, 16 U.S.C. § 832c, which makes clear that "public bodies and cooperatives" means such as are engaged in the "public business of selling and distributing" electric power. 16 U.S.C. § 832c(c). The Bonneville Power Administration has consistently construed the preference provisions of the Bonneville Act as permitting sales of preference power only to public bodies and cooperatives operating as utilities. *Cf. Aluminum Co. v. Central Lincoln Util. Dist.*, 467 U.S. 380, 384 n. 4 and text above (1984).

The decision below involves no constitutional question. It does not conflict with a decision of any other court and is consistent with agency interpretations and applications of analogous preference provisions in other statutes.

The issue of whether a political entity, *i.e.*, a state, not engaged in selling and distributing power to consumers qualifies as a "public body" within the meaning of 16 U.S.C. § 836(b) was decided in relation to the Vermont Department of Public Service as structured at the time of the proceedings before FERC. Vermont has not sought review. Cross-petitioners did not enter those proceedings until their conclusion and the issue they would present to this Court was not considered in relation to them below.

CONCLUSION

For these reasons the Cross-Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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